APPEAL NO. 052271
DECEMBER 12, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 30, 2005. At the CCH the hearing officer announced that the issues were: "what is the date of maximum medical improvement [MMI] and what is the impairment rating [IR]." The parties appear to have agreed to those two issues and discussed the addition of a third issue. The hearing officer determined that the respondent/cross-appellant's (claimant) IR is 14% as assigned by the second designated doctor whose opinion was not contrary to the great weight of the other medical evidence.

The appellant/cross-respondent (carrier) appeals the 14% IR, contending that a second designated doctor should not have been appointed and that "the first designated doctor's opinion [sic] first opinion was correct and should have been adopted by the hearing officer." The claimant also appealed, contending that: (1) the amended report of the second designated doctor was unauthorized and failed to rate the entire compensable injury; (2) that the hearing officer's decision is contrary to a prior decision and order on extent of injury; (3) that the hearing officer "failed to include" (find) a date of MMI; and (4) some evidence was improperly admitted and other evidence was improperly excluded. Both parties responded to the other party's appeal. The carrier's response to the allegation that the hearing officer did not find an MMI date was simply that the "hearing officer did not err in failing to address this issue" arguing that the claimant's response to the benefit review officer's report was not timely. The claimant filed a reply to the carrier's response to the claimant's request for review. The 1989 Act makes no provision for replies to responses and the claimant's reply, faxed and received by the Texas Department of Insurance, Division of Workers' Compensation (Division) on November 14, 2005, was not timely as a response and will not be considered.

DECISION

Reversed and remanded

First we address the claimant's appeal that the first designated doctor's reports, having "already been found to be invalid" were improperly admitted and that the hearing officer erred when he "excluded evidence offered by the Claimant." We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Appeals Panel Decision (APD) 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It also has been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence

admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We find no abuse of discretion in the hearing officer's admission/exclusion of the complained-of documents. The claimant has failed to offer sufficient proof that the admission/exclusion of the documents amounted to reversible error.

The carrier contends, among other things, that the second designated doctor was appointed "inconsistent with the relevant rule." The carrier does not specify which rule or why the second designated doctor should not have been appointed. In any event whether a second designated doctor was properly appointed was not an issue before the hearing officer and we decline to address that as an issue.

The parties stipulated to a number of facts including that the claimant "sustained a compensable injury on _____, to her right arm." A prior CCH decision dated December 29, 2003, determined that the claimant's compensable injury "extends to and includes radial nerve entrapment, transverse metacarpal ligament tear, and carpal tunnel syndrome but not to cubital tunnel syndrome." The parties stipulated that (Dr. K) was appointed (as the first) designated doctor and that he found (certified) the claimant at MMI on August 21, 2002, with a 5% IR. The assessment was agreed to by (Dr. L) the treating doctor on September 5, 2002. Subsequently, as stipulated, (Dr. D) was appointed as the second designated doctor and that he found the claimant to be at MMI on October 19, 2004, with a 15% IR. As stipulated Dr. D was given additional information (the prior CCH) and issued an amended report stating that the claimant was at MMI on October 19, 2004 (the same date as the original report) with a 14% IR. Also in evidence is a report dated February 9, 2004, from (Dr. JL) certifying "statutory" MMI on "12/03/2002," with either a 31% or 32% IR. The claimant contends that only Dr. JL rated the entire injury to include the right thumb.

MMI is defined in Section 401.011(30) as the earlier of:

(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably by anticipated;

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or

(C) the date determined as provided by Section 408.104.

Section 401.011(30)(B) is what is commonly referred to as statutory MMI. 28 TEX. ADMIN. CODE § 130.1(b)(2) (Rule 130.1(b)(2)) states that "MMI must be certified before an [IR] is assigned." *See also* APD 010393, decided March 29, 2001.

In this case the parties do not agree when the date of MMI is and there is no evidence when income benefits began to accrue (*see* Section 401.011(30)(B)). The benefit review conference report recites that the parties "agree that the Claimant

reached statutory [MMI] as of October 1, 2002." We note the stipulated date of injury is _____, and income benefits begin to accrue on the eighth day of disability. Rule 124.7(b). The carrier contends that MMI was reached on August 21, 2002, as certified by Dr. K and agreed to by Dr. L. Dr. D simply states that the claimant "is MMI as of today which is 10/19/04." Dr. JL certifies "statutory" MMI on "12/03/2002." The claimant in argument at the CCH simply states that MMI is statutory in November (presumably 2002), and on appeal asserts that MMI "is on or about November 25, 2002." Without an MMI date, either stipulated or agreed upon or found by the hearing officer and supported by the evidence, a determination of IR is premature. *See* Rule 130.1(b)(2).

We remand the decision back to the hearing officer for a determination on an MMI date and an IR that is based on the claimant's condition on that MMI date. Additional evidence may be necessary if the parties are unable to agree to the date of MMI as properly certified by a doctor under Rule 130.1.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LUMBERMENS UNDERWRITING ALLIANCE** and the name and address of its registered agent for service of process is

DEBRA S. MATHEWS-BUDET
12200 FORD ROAD, SUITE 344
DALLAS, TEXAS 75234.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge